

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

**THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN**

FRIDAY, THE 8TH JUNE 2007 / 18TH JYAISHTA 1929

MFA.No. 1548 of 2001()

**AGAINST THE ORDER DATED 28/9/1999 IN ARBITRATION IN
OP.76/1993 of III ADDL.SUB COURT, ERNAKULAM**

APPELLANT/RESPONDENT:

**RESERVE BANK OF INDIA,
EXCHANGE CONTROL DEPARTMENT,
LISSIE HOSPITAL JUNCTION,
KOCHI - 682 017,
REP. BY THE ASSISTANT EXCHANGE CONTROL OFFICER.**

BY ADV. SRI.P.JACOB VARGHESE, SC, RBI

RESPONDENT/PETITIONER:

**M/S.COMFURN,
KALOOR, KOCHI,
REP. BY ITS PARTNER.**

**BY ADV. SRI.K.L.VARGHESE
SMT.SANTHA VARGHESE**

**THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 08/06/2007 ALONG WITH CRP NO.799 OF 2000,THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:**

J.B.KOSHY & K.P.BALACHANDRAN, JJ.

M.F.A.NO.1548 OF 2001 ()

&

C.R.P.NO.799 OF 2000

Dated this the 8th day of June, 2007

J U D G M E N T

KOSHY,J.

The respondent in the appeal entered into a contract with the appellant for the work of “false ceiling and under-deck insulation for the office building at Kaloore” and the contract was accepted by letter dated 14.2.1989. The contract was terminated as according to the appellant no work was done. An Arbitrator was appointed and arbitrator by a speaking award found that termination of contract was illegal and 10% of the contract value was awarded as damages against a claim of 15% of contract value. Amount awarded was only Rs.72,334/-. E.M.D. was also directed to be returned. Petition was filed to set aside the award. That was rejected and against the order refusing to set aside the award, M.F.A.No.1548/2001 was filed. Against that part of the order

M.F.A.NO.1548 OF 2001 ()
&
C.R.P.NO.799 OF 2000

2

making the award as rule of the contract and passing a decree in terms of the award, was challenged by filing the Civil Revision Petition.

2. The whole question is whether civil court wrongly refused to set aside the award. The contract was for Rs.7,23,340/-. It is true that work was not commenced but samples were supplied by the contractor. It was found by the arbitrator that work included providing of false ceiling electricity etc. and for that work electricity was necessary and the same was not provided for the long time in spite of repeated requests as can be seen from Exts.C1 to C4. It was also found that site was also not given to claimants as obstructions and hindrance were caused by other agents who are allowed to work similarly in the same area. It was also found that materials for the work was not provided for long time even though samples were given in time and after considering the documents and entire evidence arbitrator also

M.F.A.NO.1548 OF 2001 ()
&
C.R.P.NO.799 OF 2000

3

found that within a reasonable time site was not handed over and finally it was held as follows:

“On an evaluation of all these aspects, I am of the view that the respondent has failed to fulfill their reciprocal obligations of the contract. The consequence is that Section 51, 53 and 54 of the Indian Contract Act becomes applicable and the consequence contained in it follows. I hold that the termination of the contract made through Ext.C23 is illegal. The forfeiture of the Earnest Money Deposit also is illegal.

The claimant is entitled to get back the E.M.D. of Rs.11,000/- together with 10% interest per annum as contemplated in Section 2 B of the Interest Act, being the interest paid by banks on deposit. Interest is payable from date of demand, that is, 10.6.1989 as indicated in Ext.C24.

The finding that the termination of the contract is illegal follows the ordinary and natural legal consequence that the claimant is entitled to damages under Section 73 of the Indian Contract Act. The claim for loss of profit or gains prevented is perfectly valid in the above facts and circumstances. The claimant is entitled to get a reasonable profit on account of the breach of contract. In taking this view I am also fortified by the view expressed in **State of Kerala v. Bhaskaran (1984 K.L.T. 948)**. The claimant has claimed 15% of the contract amount and produced portions of Kerala P.W.D.Manual and also M.E.S.Standard Schedule of Rates 1975 Part II

M.F.A.NO.1548 OF 2001 ()
&
C.R.P.NO.799 OF 2000

4

rates to support the claim. Considering the facts and circumstances of this case, it is only just and proper to award 10% of the contract value. Similar view was also taken by the Division Bench of the Kerala High Court in the decision mentioned above and the awarding of 10% was upheld. Even though the respondent has objected to such views I am of the opinion that it has no force in the light of the above decision cited and relied on by the respondent also to oppose the claim.

Hence the claimant is entitled to get an amount of Rs.72,334/- being 10% of the contract value of Rs.7,23,340/- under claim No.2.

In view of my finding that the claimant is entitled to damages, it is only just and fair that interest also must be awarded from today at the rate of 10% per annum for the sum of Rs.72,334/- awarded by me."

After going through the award, Court also found that specific grounds mentioned under Section 34 were not proved. There is no misconduct on the part of the arbitrator. It cannot be stated that arbitrator went beyond the terms of the contract or acted without jurisdiction. Court cannot set aside the award merely because another view is also possible. The reasoned award passed by the arbitrator after considering the documents and

M.F.A.NO.1548 OF 2001 ()
&
C.R.P.NO.799 OF 2000

5

materials placed before it cannot be interfered into except on the specific ground mentioned in the statute for setting aside the award. Such grounds were not established. Considering the facts and circumstances of the case, we see no merit in the appeal.

3. It was contended that the arbitrator had no jurisdiction because his appointment is illegal. Arbitration agreement stipulates in clause 33 is as follows:

“Save and except the clauses where the decision of the employer is final and binding upon the contractor in case of dispute on other matters may be referred to the arbitration and final decision of an arbitrator to be agreed upon and appointed by both the parties or in case of disagreements as to the appointment of a single Arbitrator, to the appointment of two arbitrators one to be appointed by each party, which arbitrators shall, before taking upon themselves the burden of reference, appoint an Umpire.”

Contractor by letter dated 23.5.1992 informed and requested the respondent for appointing arbitrator and also suggested the

M.F.A.NO.1548 OF 2001 ()
&
C.R.P.NO.799 OF 2000

6

name of an arbitrator under Section 9 of the Arbitration Act. Again notice was issued in 17.7.1992 confirming the appointment of Sri.A.S.P.Kurup as the arbitrator under the Act. First letter was not replied. In view of Sections 8 and 9 the above appointment of the arbitrator cannot be challenged as rightly held by the District court in the impugned order. The appreciation of evidence or reasoning of the arbitrator cannot be challenged in a petition for setting aside the award. It cannot be equated to an appeal from the findings of the arbitrator. Reasoning of the tribunal are not perverse or patently illegal. He has not travelled beyond the terms of contract. He did not go beyond the jurisdiction. No misconduct was committed by him on specific grounds mentioned in the Act to set aside the award. The arbitrators found on the basis of the evidence that the contractor was not able to perform the contract because of non handing over of the site, not providing electricity and not considering the samples within reasonable time. Therefore it cannot be stated that merely because

M.F.A.NO.1548 OF 2001 ()
&
C.R.P.NO.799 OF 2000

7

contract was not performed, the arbitrator has no power to grant damages for illegal termination of the contract or breach committed by the appellant. The court below also noticed that there was delay in filing of the application to set aside the award. Since we have already held that on merit award cannot be set aside, we are not looking into that question. Hence appeal and revision petition are dismissed.

J.B.KOSHY, JUDGE

K.P.BALACHANDRAN, JUDGE

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J.B.KOSHY & K.P.BALACHANDRAN, JJ.

**M.F.A.NO.1548 OF 2001 ()
&
C.R.P.NO.799 OF 2000**

J U D G M E N T

8th June, 2007